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SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1952**

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# No. 648

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JAMES AVERY,

*Petitioner,*

*vs.*

THE STATE OF GEORGIA

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## SUPPLEMENTAL BRIEF OF PETITIONER

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### Section I. Introductory Statement

This supplemental brief is prepared for two purposes:

(1) A comparison of the (Avery) case at bar with the major case decided by the United States Supreme Court on the subject since the preparation of the petition for certiorari, to-wit, *Brown* v. *Allen* (and companion cases), 73 S. Ct. 397. (It will be remembered by this Court that the above styled (Brown) case also involved several companion cases which were combined and treated simultaneously with the case of Brown in the same opinion, including the case of *Speller* v. *Allen*. For the purpose of convenience, under Section II of this supplemental brief, references to both cases, because of their great number, will

be made by setting out, in parentheses, the page number of the said combined opinion where the matter referred to appears, following the abbreviation "Id.", as follows: "(Id., p. ———)").

(2) Rebuttal of the brief of the State of Georgia in reply to petition for certiorari.

Each of these matters will be treated in a separate division of this brief, properly entitled.

## Section II. Comparison of Brown and Speller Cases With (Avery) Case at Bar

| | Brown | Speller | Avery (at bar) |
|---|---|---|---|
| I. Offense | Rape (Id., p. 412) | Rape (Id., p. 417) | Rape |
| II. Race of Defendant | Negro (Id., p. 412) | Negro (Id., p. 417) | Negro |
| III. Question Involved | Discrimination in jury selection on account of race (inter alia) (Id., p. 412) | Discrimination in jury selection on account of race (inter alia) (Id., p. 417) | Discrimination in jury selection on account of race |
| IV. Method raised in State Court | Motion to quash and motion to set aside verdict (method of raising held sufficient) (Id., p. 412) | Motion to set aside array of special veniremen (method of raising held sufficient) (Id., p. 417) | Challenge to array (method of raising held sufficient) |
| V. Method brought to United States Supreme Court | Certiorari to United States Circuit Court of Appeals, Fourth Circuit (Id., p. 402) | Certiorari to United States Circuit Court of Appeals, Fourth Circuit (Id., p. 402) | Certiorari to Supreme Court of Georgia |
| VI. Intervening proceedings between consideration by State Supreme Court and grant of certiorari by United States Supreme Court | Certiorari to State Supreme Court denied by United States Supreme Court and habeas corpus brought in United States District Court and Appealed to United States Circuit Court of Appeals (Id., p. 402) | Same as Brown case (Id., p. 402) | None |

VII. *Grounds of attack* (A proper analysis and comparison of the grounds of attack in each of the three cases under consideration can not be readily made in parallel columns like the above. However, such analysis will be continued in accordance with what appear to us to be the five major

bases of comparison, which will be treated separately under subheadings entitled and designated as follows: (a) selection from tax digest (b) past practices (c) comparative population (d) selection procedure (e) identification of Negroes as such during selection procedure).

*(a) Selection from tax digest*

The manner of selection in each of the respective cases is set out in detail in part (d) of this subdivision VII. We desire, however, to call the attention of the Court to the fact that this brief is prepared under full realization of the rule that (Id., p. 416):

> "We do not think a use, nondiscriminatory as to race, of the tax lists violates the Fourteenth Amendment, nor can we conclude on the evidence adduced that the results of the use require a conclusion of unconstitutionality.",

and that this rule was reiterated as to petitioner Speller (Id., p. 419).

*(b). Past practices*

"Former errors cannot invalidate future trials" (Id., p. 418)..

While there had been a statutory history of discrimination in both the Brown and Speller cases in the Counties where each was tried (Id., pp. 414, 418), it is carefully explained upon the above stated pages and the pages immediately preceding and following them that there had been a substantial change both in the law and in the results of the selection procedure as to the comparative numbers of White and Negro persons in the respective Counties, which resulted in a great increase in the number of Negroes called to jury service. On the other hand, in the present case, the

practices now followed are the same as they have been for the past 50 years (R. 15). Accordingly, as the former practices are evidentiary in nature (Id., p. 419) and are only material in the light of what they may indicate as to the practice in any given case at bar (Id., p. 419), it was not material in the Brown and Speller cases (Id., pp. 412, 419), but is vitally important in the instant case, which is substantially parallel to the cases cited in the original petition and brief, but not to the Brown and Speller cases.

*(c) Comparative population*

(The following tables show the comparative numbers and percentages of White and Negro persons in the respective counties involved in the Brown and Speller cases and this case at the various stages in the process of selecting a jury down to the final venire from which the jury was selected, in so far as the facts are available in each case.)

(A) Brown case

1. Population according to the 1940 census (Id., p. 412):

| | Population | Per cent | 21 plus | Per cent |
|---|---|---|---|---|
| White | 85,323 | 67.5 | 50,469 | 66.5 |
| Negro | 41,152 | 32.5 | 25,057 | 33.5 |
| | 126,475 | 100.0 | 75,556 | 100.0 |

2. Persons on 1948 poll tax digest (Id., p. 413):

| | Male Population in Winston Township | Per cent | Male Population outside Winston Township | Per cent | Total | Per cent |
|---|---|---|---|---|---|---|
| White | 7,659 | 73.8 | 10,319 | 94.6 | 17,978 | 84.5 |
| Negro | 2,752 | 26.2 | 587 | 5.4 | 3,339 | 15.5 |
| | 10,411 | 100.0 | 10,906 | 100.0 | 21,317 | 100.0 |

3. Grand jurors summoned (Id., p. 413):

| | Number | Per cent |
|---|---|---|
| White | 55 or 56 | 93-1/3 or 91-2/3 |
| Negro | 4 or 5 | 6-2/3 or 8-1/3 |
| | 60 | 100 |

4. Grand jurors finally chosen (Id., p. 413):

| | Number | Per cent |
|---|---|---|
| White | 17 | 94.5 |
| Negro | 1 | 5.5 |
| | 18 | 100.0 |

5. Petit jurors summoned (Id., p. 413):

| | Number | Per cent |
|---|---|---|
| White | 29 | 78.4 |
| Negro | 8 | 21.6 |
| | 37 | 100.0 |

6. Special venire from which petit jury was finally chosen (Id., p. 413):

| | Number | Per cent |
|---|---|---|
| White | 17 | 85 |
| Negro | 3 | 15 |
| | 20 | 100 |

7. Usual percentages of grand and traverse jurors drawn (Id., p. 414):

| | Grand | Traverse |
|---|---|---|
| White | Between 93 and 90 | Between 91 and 83 |
| Negro | Between 7 and 10 | Between 9 and 17 |
| | 100 | 100 |

## (B) Speller Case

1. Persons on tax digest (Id., p. 419):

| | Number | Per cent |
|---|---|---|
| White | 5,097 | 62 |
| Negro | 3,136 | 38 |
| | 8,233 | 100 |

2. Persons in jury box (Id., p. 418):

| | Number | Per cent |
|---|---|---|
| White | 1,981 | 93 |
| Negro | 145 | 7 |
| | 2,126 | 100 |

3. Persons drawn on special venire (*Speller* v. *Crawford*, 99 F. Supp. 92, 97):

| | Number | Per cent |
|---|---|---|
| White | 93 | 93 |
| Negro | 7 | 7 |
| | 100 | 100 |

4. Jurors actually summoned, from which jury was finally chosen (*Speller* v. *Crawford, supra*, p. 97):

| | Number | Per cent |
|---|---|---|
| White | 59 | 93.7 |
| Negro | 4 | 6.3 |
| | 63 | 100.0 |

(C) This case

The facts and figures with reference to this case are tabulated on p. 2 of petition for certiorari, reference to which is here made, and will not be repeated here.

*(d) Selection procedure*

A. Brown case

1. All males between 21 and 50 years of age are required to list themselves for poll tax as well as to list their property (Gen. Stat. N. C. #105-307, 105-341, 307-341) (Id., p. 412).

2. A list of names is compiled by designated county officials consisting of all county property and poll taxpayers who make returns. Both grand and traverse jurors are drawn from this list (Id., p. 413).

3. This list is tendered to the County Commissioners for use in jury selection. In this connection, it should be observed that this list contained 40,000 names and that it was a complete compilation without regard to the race of the persons thereon (Id., p. 413).

4. That the list was cut into tickets of uniform size, each containing one person's name (Id., p. 413).

5. The tickets are placed in a jury box (Id., p. 413).

6. The names of both grand and traverse jurors are drawn by a small child in public and recorded there (Id., p. 413).

7. Grand jurors are drawn and selected from this list in January and July of each year for a six-month term in panels of 60 persons. This drawing is also made by a child. It is made in the presence of the County Commissioners (Id., p. 413).

8. A jury order containing the names of these persons is prepared and given to the Sheriff (Id., p. 413).

9. The sheriff summons all persons on the list whom he can find (Id., p. 413).

10. The names of the persons summoned are placed in a special section of the jury box (Id., p. 413).

11. An 18-man grand jury is drawn from this list. This drawing is made by a child in the presence of the Superior Court judge (Id., p. 413).

12. The names of the persons not drawn are placed in the petit jury box (Id., p. 413).

13. Petit jurors are drawn as needed in groups or panels of 44 persons each (Id., p. 413).

14. The names of such panels are given to the sheriff (Id., p. 413).

15. The sheriff summons all persons on the list whom he can find (Id., p. 413).

16. All summoned persons are required to report for jury duty (Id., p. 413).

It will be observed that, in the Brown case, it affirmatively appeared that there was no improper handling of tickets because:

1. The names of all property owners were placed in the jury box on identical tickets or pieces of paper.

2. The various drawings from the box were made by a

child and in the presence of either the public, the county commissioners, or the Superior Court judge.

3. There was no indication of the race of the individual jurors on the list of names of persons to be summoned which was given to the deputies.

4. The non-existence of fraud in the selection procedure was admitted as a matter of fact.

5. The proportion of Negroes on the grand and traverse juries finally selected was substantially the same as that on the original source of jurors, to-wit, the tax lists.

Accordingly, in the Brown case, the Court was reduced to the proposition of whether the use of tax books as an exclusive source of jurors was, per se, an unconstitutional discrimination against the Negro race, and

Whether the existing statutes with reference to jury selection effected such discrimination by their terms.

B. Speller case

The Speller case does not go into nearly as much detail as the Brown case, probably, mainly because many of the same facts as to procedure apply to both. However, we definitely find the following facts:

1. The clerk selected names for the jury box from the persons who had "the most property" whose names appeared on the tax digest. He testified that no racial discrimination entered into his selection (Id., p. 419).

2. The venire was drawn from this box by a child, aged five, in the presence of the defendant and his counsel (Id., p. 419).

3. All the names drawn were given to the sheriff and summons issued (Id., p. 419).

(C) This case

The facts of this case are set out in the original petition for certiorari and the brief and record in support thereof,

and will be analyzed further in the summary of this section of this brief (Subdivision VII).

*(e) Identification of Negroes as such during selection procedure*

This problem did not arise in the Brown case. In the Speller case (Id., p. 417), defendant assigned error on the ground that the Court refused to permit him to produce evidence that dots were placed by the names of Negroes on scrolls (tickets) in the jury box, on the ground of immateriality. The Court, pointing out, as above shown, that the jury had been drawn fairly notwithstanding this practice, held that the practice could not have harmed the defendant and that the fact that such identification of Negroes had been made by some unknown person (which would have been held unlawful had it been followed by actual discrimination) would not, in itself, constitute a denial of due process, if the remaining facts of the case negatived discrimination.

It is this precise point that defendant pointed out in his petition for certiorari and main brief in support thereof, pages 21, 22, wherein he said:

> "Defendant acknowledges that, had this method of printing tickets been used, and had a substantially similar proportion of Negro persons been found at all places from the Tax Receiver's digest to the final jury panel, the color of the tickets upon which the respective names were printed would be immaterial, but such is not the case."

Undoubtedly if, in the Speller case, the presence of the dots had been followed up by evidence of exclusion, the ruling would have been different.

There was no explanation of the practice in our case except

(1) custom, and
(2) facilitating location of jurors (R. 15).

Custom, to say the least, is not an argument in support of the constitutionality of the practice, but is, rather, evidence of habitual discrimination over 50 years which continued and infested the procedure of selecting the jurors who tried James Avery, the defendant in this case.

The purported facilitation of location of jurors by the sheriff was proved to be a subterfuge for discrimination when it was shown that the sheriff never looked at the yellow tickets in an official capacity but only upon the names of the jurors finally chosen which had been drawn from the box and written on a separate list, both Negro and White being written on paper of the same color (R. 24).

VIII. Summary

The reason afforded for the reduction in the percentage of Negroes between the tax digest and the jury box in the Speller case, to-wit, that selection was made from those with the most property (Id., p. 419), was, to say the least, logical and explainable on a basis other than that of discrimination, and was tolerated although there was an apparent implication in the language "economic basis not attacked here" (Id., p. 420) that it did not receive full sanction and was tolerated only because no proper attack was made upon it. Had attack been made upon the ground that the adoption of the ownership of the greatest amount of property as the standard of jury selection was, in itself, a discrimination on account of race, and that said standard was adopted in order to afford a colorable veil over the basic scheme to deprive the Negro of indiscriminate representation on jury lists and to deprive the Negro defendant of the right to have an indiscriminate selection of jurors of both White and Negro races to try his case, the decision might well have been different.

In the case at bar, not even a colorable excuse is afforded

for the drastic reduction in the percentage of Negro persons from the tax list to the percentage on the jury list.

Also, the basic practice complained of in this case (to-wit, improper selection *after* the jury list was made from the tax digest) was not involved in the Brown and Speller cases.

The only ground of attack, therefore, in the Speller case, was the practice by which the juries were selected by the commissioners. That is not true in the case at bar.

Likewise, it should be remembered that the following additional distinctions exist:

| Brown case | This (Avery) case |
|---|---|
| 1. The jury list was selected by lot from the tax digest by a child. | 1. The jury list was selected by a discretionary use of judgment by the commissioners. |
| 2. The names of the jurors so selected were printed on identical tickets. | 2. The names of the jurors so selected were printed on tickets of different colors at the specific instruction of the Clerk of the Jury Commission. |
| 3. A child draws the individual jurors for service at any given time. | 3. The judge draws the names of such individual jurors and a deputy sheriff "arranges" them and a typist types them (page 14 of original petition for certiorari and main brief in support thereof). |
| 4. There was nothing on the list of jurors given to the sheriff to be summoned that indicated whether the person to be summoned was White or Negro. | 4. The list of jurors given the sheriff to be summoned disclosed whether the individual was White or Negro. |

Each of these distinctions is an open avenue to fraud in the (Avery) case at bar that does not exist in the Brown case. We urge again, in the light of the comparison of the results and of the procedures, the affirmance in one is not a precedent for affirmance in the other. The principles governing both are the same; the factual situations are not.

In the Brown case, the percentage of Negroes called in each successive stage was almost in the precise proportion to that on the original jury list (part (c) of this subdivision VII of this brief). In the case at bar, the proportion was reduced to zero (petition for certiorari and main brief in support thereof, p. 2).

Again, as to the case at bar, the attention of the Court is invited to the possibility of discrimination by grouping or "arranging" as shown in pages 32 and 33 of petition for certiorari and main brief in support thereof.

We conclude: when there has been a consistent practice that facilitates discrimination and also facts consistently indicating that discrimination has existed and does exst, the practice itself should be declared unlawful. If an improper method (a method facilitating, though not necessarily effecting, discrimination) is properly applied (i. e., applied in such a manner that discrimination affirmatively does not result), obviously, the defendant can have no redress from this Court. However, if such method is improperly applied (i. e., applied in such a manner that it can not be affirmatively said that discrimination does not result) both the method and its application are subject to excision by this Court, and, a fortiori, this is true in cases such as this, where the improper result is visibly manifest.

### Section III. Rebuttal to Brief of State of Georgia

It is significant to note that the State of Georgia, in its brief in opposition to grant of certiorari in this case (there

entitled "No. 102 Misc."), relied on no authority of the Supreme Court of the United States. True, appeal (treated as petition for certiorari) was denied by this Court to the Supreme Court of North Carolina in *Wells* v. *State of North Carolina*, 320 U. S. 635, 58 S. Ct. 18. As to this, was it not said (*Brown* v. *Allen*, supra, p. 407, and cit.):

> "the denial of certiorari 'imports no expression of opinion upon the merits of a case' ".

It is true that the question of racial discrimination was discussed by the Supreme Court of Georgia in *Herndon* v. *State*, 178 Ga. 832, 174 S. E. 597, rehearing denied 179 Ga. 597, 176 S. E. 620, but it was only discussed by that court as dictum, and not as a matter governing the opinion (see par. 1 of said opinion), and it was never raised at all before the Supreme Court of the United States, to which said case was brought by appeal, the question there being only on the issue of whether the Supreme Court of the United States should consider the question of whether the substantive construction by the Supreme Court of Georgia of the statute under which the defendant was convicted rendered the statute unconstitutional (*Herndon* v. *State of Georgia*, 295 U.S. 441, 55 S. Ct. 794).

The State of Georgia also relied on the statement of Judge Cardozo in the case of *Coler* v. *Corn Exchange Bank*, 250 N.Y. 136, 164, N. E. 882, as to judicial sanction being given a practice because it has been followed, by "common consent", for a long period of time, as giving sanction to the practice complained of in the case at bar. On the contrary, in the various cases cited by petitioner in his petition for certiorari and main brief in support thereof, it is the very consistency with which the practices complained of have been followed over the years that has constituted the conclusive evidentiary fact resulting in the reversal

of the convictions on the grounds of denial of due process and equal protection.

In response to the contentions under parts 2 and 3 of respondent's said brief, petitioner has never contended that the burden of proof was otherwise than upon him, and respectfully re-invites the attention of the Court that, in all cases where reversals have been rendered in this Court on the grounds of discrimination in jury selection, the mathematical result of the selective process has been the vital factor considered by the Court. Indeed, as pointed out on page 20 of petition for certiorari and main brief in support thereof, our basic contention is that, in the light of the admitted practice as to the use of the tickets of different colors, the final result

> "cannot be sensibly explained by mathematical formulae or coincidence in the absence of discrimination".

## Conclusion

It is respectfully submitted that, for all the reasons heretofore stated, conviction should be reversed.

Respectfully submitted,

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